

*Chapter 4*

*Subdivision and Survey Exemptions*

**CHAPTER 4. DIVISIONS OF LAND EXEMPT FROM SUBDIVISION REVIEW**

**4-1. PURPOSE**

The MSPA provides that certain divisions of land, which would otherwise constitute subdivisions, are exempt from local subdivision review and approval, unless the use of the exemption is an attempt to evade the MSPA. The exemptions are found in Part 2 of Title 76, Chapter 3, MCA. These regulations address the more commonly used exemptions.

**4-2. GENERAL CRITERIA TO DETERMINE WHETHER A PROPOSAL IS AN ATTEMPT TO EVADE THE MSPA**

The governing body and its agents, when determining whether an exemption described in Sections 4-3, 4-4, or 4-5, is claimed for the purpose of evading the MSPA, shall consider all of the surrounding circumstances, including the following:

- a. The nature of the claimant's business,
- b. The prior history of the particular tract in question,
- c. The proposed configuration of the tracts if the proposed exempt transaction is completed,
- d. Any pattern of exempt transactions that will result in the equivalent of a subdivision without local government review, and
- e. The rebuttable presumptions for specific exemptions as outlined in the following sections of this chapter. A rebuttable presumption refers to identifiable conditions, that, when they exist require further consideration to determine whether or not an exemption request is an evasion of the MSPA.

**4-3. DIVISIONS OF LAND WHICH MAY BE ENTIRELY EXEMPT FROM THE REQUIREMENTS OF THESE REGULATIONS AND THE MONTANA SUBDIVISION AND PLATTING ACT [76-3-201, MCA]**

The divisions of land described in this section shall be examined to determine whether or not the requirements of the MSPA and these regulations apply to the division. The requirements of these regulations and the MSPA do not apply unless the method of disposition is adopted for the purpose of evading these regulations or the MSPA, or as otherwise specifically provided, when:

- a. A division of land is created by order of any court of record in this State or by operation of law or that, in the absence of agreement between the parties to the sale, could be created by an order of any court in the state pursuant to the law of eminent domain, Title 70, Chapter 30. Before a court of record orders a division of land, the court shall notify the Planning Department as the designated agent of the BCC of the pending division and allow the governing body through its designated agent the Planning Department, to present written comments on the subdivision. [76-3-201(1)(a) and 76-3-201(2) MCA]
- b. A division of land is created to provide security for mortgages, liens, or trust indentures for the purpose of construction, improvements to the land being divided, or refinancing purposes.

*Chapter 4*

*Subdivision and Survey Exemptions*

i. This exemption applies:

- A. To a division of land of any size;
- B. If the land that is divided is only conveyed to the financial or lending institution to which the mortgage, lien, or trust indenture was given, or to a purchaser upon foreclosure of the mortgage, lien, or trust indenture. (Note: No parcel is created unless and until foreclosure.) A transfer of the divided land, by the owner of the property at the time the land was divided, to any party other than those identified in the preceding sentence subjects the division of land to the requirements of the MSPA and these regulations and requires subdivision review; and
- C. To a parcel that is created to provide security under this subsection. The remainder of the tract of land, if applicable, is subject to the provisions of the MSPA and these regulations and requires subdivision review.

ii. Statement of Intent

Under policies by many lending institutions and federal home loan guaranty programs, a landowner who is buying a tract with financing or through a contract for deed is required to hold title to the specific site on which the residence will be built. The intended purpose of this exemption is to allow a person who is buying a tract using financing or contract for deed to segregate a smaller parcel from the tract for security for financing construction of a home on the property.

iii. Use of Exemption

- A. This exemption is not available to simply create a parcel without review by claiming that the parcel will be used for security to finance construction of a home or other structure on the proposed lot.
- B. This exemption may not be properly invoked unless (1) the claimant is purchasing a larger tract through financing or a contract for deed (and thus does not hold title) and (2) a lending institution requires the landowner to hold title to a small parcel of the tract because the smaller tract is required as security for a building construction loan.

iv. Required Materials

When this exemption is to be used, the landowner must submit the following items with the submittal to the Planning Department:

- A. A statement of how many interests within the original tract will be created by use of the exemption;
- B. A statement explaining who will have title to and possession of the balance of the original parcel after title to the exempted interest is conveyed; and

*Chapter 4*

*Subdivision and Survey Exemptions*

- C. A signed statement from a lending institution that the creation of the interest is necessary to secure a loan.

v. Rebuttable Presumptions

The use of this exemption is presumed to have been adopted for the purpose of evading the Act if:

- A. It will create more than one new building site;
  - B. The financing is not for construction or improvements on the exempted parcel, or for re-financing;
  - C. The person named in the "statement explaining who would have possession of the remainder parcel if title to the exempted parcel is conveyed" is anyone other than the borrower of funds for construction;
  - D. Title to the exempted interest will not be initially obtained by the lending institution if foreclosure occurs;
  - E. There exists a prior agreement to default or a prior agreement to purchase only a portion of the original tract;
  - F. It appears that the principal reason the interest is being created is to create a building site and using the interest to secure a loan is a secondary purpose; or
  - G. The division of land is created for the purpose of conveyance to any entity other than the financial or lending institution to which the mortgage, lien or trust indenture was given or to a purchaser upon foreclosure of the mortgage, lien or trust indenture.
- c. A division of land creates an interest in oil, gas, minerals, or water that is severed from the surface ownership of real property;
  - d. A division of land creates cemetery lots;
  - e. A division of land is created by the reservation of a life estate;
  - f. A division of land is created by lease or rental for farming and agricultural purposes;
  - g. A division of land is in a location over which the state does not have jurisdiction; or
  - h. A division of land is created for public rights-of-way or public utility sites. A subsequent change in the use of the land to a residential, commercial, or industrial use is subject to the requirements of the MSPA and these regulations and requires subdivision review and DEQ sanitation review.

*Chapter 4*

*Subdivision and Survey Exemptions*

**4-4. DIVISIONS OF LAND WHICH MAY BE EXEMPT FROM REVIEW AND SURVEYING**

- a. Condominiums, which are generally subject to review as subdivisions, may be exempt from review, provided they are constructed on land subdivided in compliance with these regulations and the MSPA, or are located on lots within incorporated cities and towns, and:
  - i. The approval of the original subdivision of land expressly contemplated the construction of the condominiums and 76-3-621, MCA, is complied with; or
  - ii. The condominium proposal is in conformance with applicable zoning regulations, when zoning regulations are in effect.
  - iii. The term "expressly contemplated" in these regulations shall mean that the approximate location of buildings and the maximum number of buildings and units were provided with the subdivision application.
- b. Subdivisions created by rent or lease are exempt from the surveying and filing requirements of the MSPA and these regulations, but must be submitted for review and approved by the BCC as a subdivision under Section 3-5 before portions may be rented or leased, unless the following circumstances apply:
  - i. When the land upon which an improvement is situated has been subdivided in compliance with the MSPA, the sale, rent, lease or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is not a division of land and is not subject to the MSPA or these regulations; or
  - ii. The sale, rent, lease, or other conveyance of one or more parts of a building, structure or other improvement, whether existing or proposed, is not a division of land and is not subject to the requirements of the MSPA or these regulations.
  - iii. For new structurally connected additions proposed to meet subsections i and ii above that require extension of or additional wastewater treatment systems, an administrative (wastewater exception) review is required in accordance with Section 3-5-2.
- c. A division of land created by lease or rental of contiguous airport related land owned by a city, county, the state, or a municipal or regional airport authority is not subject to the MSPA or these regulations, provided that the lease or rental is for onsite weather or air navigation facilities, the manufacture, maintenance, and storage of aircraft, or air carrier related activities.
- d. A division of state-owned land is not subject to the MSPA or these regulations unless the division creates a second or subsequent parcel from a single tract for sale, rent, or lease for residential purposes after July 1, 1974.
- e. A division of land in a deed, contract, lease, or other conveyance, which was executed prior to July 1, 1974.
- f. Instruments of transfer of land that is acquired for State highways may refer by parcel and project number to State highway plans that have been recorded in compliance with 60-2-209, MCA, and

*Chapter 4*

*Subdivision and Survey Exemptions*

are exempted from the surveying and platting requirements of the MSPA and these regulations. A survey or plat for the recordation of an instrument transferring title to a remainder that was created when the state obtained property for a highway right-of-way is not required. [44 A.G. Op. 25 (1992)]. If such parcels are not shown on highway plans of record, instruments of transfer of such parcels shall be accompanied by and refer to appropriate certificates of survey and plats when presented for recording.

**4-5. DIVISIONS OF LAND WHICH MAY BE EXEMPT FROM REVIEW BUT SUBJECT TO SURVEY REQUIREMENTS AND ZONING REGULATIONS**

Unless the method of disposition is adopted for the purpose of evading these regulations or the MSPA, the following divisions of land are not subdivisions under these regulations and the MSPA, but are subject to the surveying requirements of 76-3-401, MCA, and zoning regulations adopted under Title 76 chapter 2. A division of land may not be made under this section unless the County Treasurer has certified that all real property taxes and special assessments assessed and levied on the land to be divided have been paid. The Clerk and Recorder shall notify the Planning Department if a land division described in this section or 76-3-207(1), MCA, is submitted to the Clerk and Recorder prior to the survey being submitted to the Planning Department for evasion review.

**4-5-1. Relocation of Common Boundary [76-3-207(1)(a), MCA]**

a. Statement of Intent

The intended purpose of this exemption is to allow a change in the location or the elimination of a boundary line between adjoining properties outside of a platted subdivision and to allow a one-time transfer of a tract to effect that relocation or elimination without subdivision review.

b. Required Information

Certificates of survey claiming this exemption must clearly distinguish between the existing boundary location and, in case of a relocation, the new boundary. This must be accomplished by representing the existing boundary with a dashed line and the new boundary, if applicable, with a solid line. The appropriate certification set forth in ARM 24.183.1104 (1)(f) must be included on the certificate of survey.

c. Use of Exemption

The proper use of the exemption for relocating common boundary lines is to adjust the location of a boundary between adjoining parcels of land outside of a platted subdivision, without creating an additional parcel. The exemption may not be used if the division of land would result in the permanent creation of one or more additional parcels of land.

d. Rebuttable Presumptions

The use of this exemption is presumed to have been adopted for the purpose of evading the MSPA if:

*Chapter 4*

*Subdivision and Survey Exemptions*

- i. The reviewing agent determines that the documentation submitted according to this section does not support the stated reason for relocation;
- ii. The proposed relocation creates a parcel of less than 160 acres which, prior to the relocation included more than 160 acres;
- iii. The proposed relocation creates a new buildable tract from one that did not have a practical building site;
- iv. The proposed relocation significantly changes the area between the existing and proposed parcel sizes; or
- v. The proposed relocation would cause significant impacts to the criteria listed in Section 3-2-8 that would likely lead to imposition of significant conditions of approval, or denial, of an equivalent subdivision application.

**4-5-2. A Gift or Sale to a Member of the Immediate Family [76-3-207(1)(b), MCA]**

a. Statement of Intent

The intent of this exemption is to allow a landowner to convey one parcel outside of a platted subdivision to each member of his or her immediate family, without local subdivision review. A single parcel may be conveyed to each member of the immediate family under this exemption in each county where the landowner owns property. This exemption may be used only by grantors who are natural persons and not by non-corporal legal entities such as corporations, partnerships, and trusts.

b. Required Information

A certificate of survey (or recording of an instrument of conveyance) that uses this exemption to create a parcel for conveyance to a family member must show the name of the grantee, relationship to the landowner, the parcel to be conveyed under this exemption, and the landowner's certification of compliance [ARM 24.183.1104(1)(f)]. The landowner must provide evidence of the familial relationship between the proposed grantor and grantee.

c. Use of Exemption

One conveyance of a parcel to each member of the landowner's immediate family is eligible for exemption from subdivision review under the MSPA and these regulations. However, the use of the exemption may not create more than one new parcel per eligible family member.

d. Rebuttable Presumptions

- i. Any proposed use of the family gift or sale exemption to divide a tract that was previously created through the use of an exemption will be presumed to be adopted for purposes of evading the MSPA.

*Chapter 4*

*Subdivision and Survey Exemptions*

- ii. The use of the family gift or sale exemption to divide tracts that were created as part of an overall development plan with such characteristics as common roads, utility easements, restrictive covenants, open space, or common marketing or promotional plan raises a rebuttable presumption that the use of the exemption is adopted for purposes of evading the MSPA.
  - iii. A transfer of a parcel of land by one family member to another, by quitclaim deed, followed by an attempted use of this exemption will result in the presumption the method of disposition is adopted for the purpose of evading the MSPA and these regulations.
  - iv. The use of the exemption to create more than one additional or remaining parcel of less than 160 acres in size is presumed to be adopted for the purpose of evading the MSPA and these regulations.
- e. Restriction on Subsequent Transfer

The transfer or potential sale of the gifted tract created by the family gift or sale exemption within three years of creation of the tract will result in the presumption that the use of the exemption was adopted for the purposes of evading the MSPA and the recordation of the instrument of conveyance of a parcel created by family gift or sale within three years of creation may be subject to refusal of the Clerk and Recorder.

**4-5-3. Divisions of Land Proposed for Agricultural Use Only [76-3-207(1)(c), MCA]**

a. Statement of Intent

This exemption is intended to allow a landowner to create a parcel for gift, sale, or agreement to buy and sell, outside a platted subdivision, without subdivision review if the parcel will be used only for the production of livestock or agricultural crops and no residential, commercial, or industrial buildings, which require water or sewer, will be built on it.

b. Required Information

A certificate of survey that uses this exemption to create a parcel only for agricultural use requires a covenant running with the land in accordance with 76-3-207(1)(c), MCA, and a signed and acknowledged recitation of the covenant on the face of the survey. [ARM 24.183.1104(f)(iii)]

c. Use of Exemption

- i. "Agricultural purpose," for purposes of these evasion criteria, means all aspects of farming or ranching including the cultivation or tilling of soil; dairying; the production, cultivation, growing, or harvesting of agricultural or horticultural commodities; raising of livestock, bees, fur-bearing animals or poultry; and any practices including forestry or lumbering operations, preparation for market or delivery to storage, to market, or to carriers for transportation to market [See 41-2-103(1), MCA.]. Agricultural lands are exempt from review by the DEQ, provided the applicable exemption under the Sanitation in Subdivisions Act is properly invoked by the property owner.

*Chapter 4*

*Subdivision and Survey Exemptions*

- ii. Any change in use of the land for anything other than agricultural purposes subjects the parcel to review as a minor subdivision and sanitation review.
- iii. Residential, commercial, or industrial structures, including facilities for commercial processing of agricultural products, may not be utilized, constructed, or erected on parcels created under this exemption unless the covenant is revoked and sanitation review completed.

d. Rebuttable Presumptions

The following conditions must be met or the use of the exemption will be presumed to have been adopted for the purpose of evading the MSPA:

- i. The parties to the transaction must enter into a covenant running with the land and revocable only by mutual consent of the BCC and the property owner that the divided land will be used exclusively for agricultural purposes. The covenant must be signed by the property owner, the buyer, and the members of the governing body.
- ii. The landowner must demonstrate that the planned use of the exempted parcel is for agricultural purposes and that no residential, commercial, or industrial buildings have been or will be built on it.
- iii. The parcel must meet the criteria for an agricultural designation under Section 15-7-202, MCA.

**4-5-4. Relocation of Common Boundaries Involving Platted Subdivisions [76-3-207 (1)(d), (e) and (2)(a), MCA]**

a. Statement of Intent

- i. The MSPA allows certain revisions to platted subdivisions, which include relocation of common boundaries and the aggregation of lots for five (5) or fewer lots within a platted subdivision or the relocation of a common boundary between a single lot in a platted subdivision and adjoining land outside a platted subdivision (but a restriction or requirement on either continues to apply), without review.
- ii. If a change is made to a platted subdivision, which rearranges six or more lots, the BCC must review and approve the amended plat and an amended plat must be filed with the Clerk and Recorder.

b. Use of exemption

Relocation of a common boundary between a single lot in a platted subdivision and adjoining land outside a platted subdivision [76-3-207(1)(e), MCA] is allowed, because no additional parcels are created. Subdivision review is not necessary because the relocation does not create any additional division of land.



*Chapter 4*

*Subdivision and Survey Exemptions*

c. Rebuttable presumptions

- i. If the resulting lots are inconsistent with the approved subdivision and the uses in it, the use of the exemption will be presumed to have been adopted for the purpose of evading the MSPA.
- ii. If the resulting lots do not comply with existing zoning, covenants, and/or deed restrictions, the use of the exemption will be presumed to have been adopted for the purpose of evading the MSPA.
- iii. If additional lots are created, the use of the exemption will be presumed to have been adopted for the purpose of evading the MSPA.
- iv. The proposed relocation creates a new buildable tract from one that did not have a practical building site.
- v. The proposed relocation significantly changes the area between the existing and proposed parcel sizes.
- vi. The proposed relocation would cause significant impacts to the criteria listed in Section 3-2-8 that would likely lead to imposition of significant conditions of approval, or denial, of an equivalent subdivision application.

**4-6. PROCEDURES AND REVIEW OF SUBDIVISION EXEMPTIONS**

**4-6-1. Submittal**

Any person seeking exemption from the requirements of the MSPA, shall submit to the Planning Department:

- (a) Subdivision exemption application (See the relevant Administrative Materials available at the Planning Department for the application form.);
- (b) Drawing showing the proposed exemption;
- (c) Conflict of interest statement;
- (d) Other required information as set forth in Sections 4-2, 4-3, 4-4, and 4-5; and
- (e) A notarized request for family transfer form signed by all parties, if applicable.
- (f) In addition, applicants may want to provide written responses regarding the general evasion criteria and any specific rebuttable presumptions that apply to their exemption request.

For purposes of 76-3-207, MCA, when a parcel of land for which an exemption from subdivision review is claimed is being conveyed under a contract-for-deed, the terms "property owner," "landowner," and "owner" mean the seller of the parcel under the contract-for-deed, with the exception of family transfers in which case the grantor must be the titleholder. [ARM 24.183.1104]

*Chapter 4*

*Subdivision and Survey Exemptions*

**4-6-2. Review**

When a division of land for which an exemption is claimed is submitted to the Planning Department, the Planning Department shall send notice of the proposed exemption to designated agents of the BCC including the County Attorney, RCEH, Treasurer, and Clerk and Recorder. The Planning Department and the BCC's designated agents shall review the claimed exemption to verify that it is the proper use of the claimed exemption and complies with the requirements set forth in the MSPA, the Montana Sanitation in Subdivisions Act, and these regulations.

- a. The Planning Department shall hold a public meeting with any interested designated agents of the governing body to review the proposed exemption to determine whether the use of the exemption creates a rebuttable presumption that the use of the exemption would evade the Montana Subdivision and Platting Act or these regulations. The applicant and the applicant's representative shall be notified of the date and time of the public meeting. The Planning Department shall review each exemption proposal against the general evasion criteria set forth in Section 4-2 and against any applicable rebuttable presumptions as may be set forth in Sections 4-3, 4-4, or 4-5. (See option above for providing written responses as part of the application materials.) The applicant, the applicant's representative, and the public shall be permitted to comment on the proposal and rebut any presumptions. Following public comment, planning staff shall announce their decision regarding each application during the public meeting.
- b. Following the public meeting, the Planning Department shall mail a decision letter to the applicant stating the applicant's eligibility to use the exemption. If the exemption is denied, the notification shall indicate the reasons for the denial and that the applicant may request a hearing with the BCC to review the denial.
- c. An approval of a subdivision exemption is valid for a period for one year. A one-year extension may be granted in writing by the Planning Department upon written request of the applicant received prior to expiration of the approval period.
- d. To record the exemption, the applicant is required to submit the following documents, as appropriate, to the Clerk and Recorder's Office:
  - i. The original copy of the approval letter.
  - ii. A copy of the "Notarized Request for Family Transfer Form," if requesting a family transfer exemption.
  - iii. The appropriate recording fees.
  - iv. The survey (one paper copy, two mylar copies) with the appropriate certification of exemption on the face of the survey. (For form and content instructions, refer to the Administrative Materials available at the Planning Department.)
  - v. The original copy of the Certificate of Subdivision Approval from the DEQ and/or provide a letter of approval from the RCEH for the exemption(s) from DEQ review quoted on the survey.

*Chapter 4*

*Subdivision and Survey Exemptions*

- vi. For a court order, a copy of the order and evidence of Planning Department review per Section 4-3(a).
  - vii. For a family transfer, a deed(s) that transfers the parcel(s) to the appropriate family member(s).
  - viii. For an agricultural exemption, a covenant that runs with the land that restricts the property to agricultural use and that is revocable only by mutual consent of the BCC and the property owner.
  - ix. For an exemption for construction financing, the mortgage, lien, or trust indenture, which states that the interest is being created only to secure a construction mortgage, lien, or trust indenture.
  - x. For a boundary line relocation, a quit claim or warranty deed or recordable agreement from adjoining property owners for the entire newly described parcel(s) or that portion of the tract(s) that is being affected.
- e. The Clerk and Recorder's Office shall review the documents submitted for recording and determine whether the submittal is complete or incomplete. If the application is incomplete, the Clerk and Recorder's Office shall notify the applicant of any deficiencies. The Clerk and Recorder's Office shall take no further action to process the application until the deficiencies are remedied.
- f. For those surveys that constitute a division of land, the County Treasurer, or designated agent, shall certify that all real property taxes and special assessments assessed and levied on the land have been paid.
- g. The Clerk and Recorder shall file the survey if it conforms to these regulations and the MSPA.

**4-6-3. Appeals**

- a. Any person whose proposed use of an exemption has been denied by the Planning Department because the proposed division of land has been deemed an attempt to evade the MSPA, and these regulations, may appeal the Planning Department's decision to the BCC. The person may request a public hearing, and may submit additional evidence to show that the use of the exemption in question is not intended to evade the MSPA or these regulations, and, thereby rebut a presumption.
- b. If the BCC concludes that the evidence and information overcome the presumption that the exemption is being invoked to evade the MSPA or these regulations, it may authorize the use of the exemption in writing, which shall serve as the approval letter required to be submitted in Section 4-6-2(d)(i).
- c. If the person proposing to use an exemption chooses not to rebut a presumption when the Planning Department deems the use of the exemption an attempt to evade the MSPA and these regulations, or if the BCC determines that the proposed use of an exemption was for the purpose

Chapter 4

Subdivision and Survey Exemptions

of evading the MSPA or these regulations, the landowner proposing to use the exemption may submit a subdivision application for the proposed land division.

**4-7. REMAINING PARCELS OF LAND**

Occasionally parcels of land are created after the rest of the land has been subdivided or after an exemption is used to divide the land. The term "remainder" has been used to refer to that portion of an original tract which is not itself created for transfer but which is left after other parcels are segregated for transfer.

A "remainder" less than 160 acres in size, contiguous to a proposed subdivision, will be considered a lot in that subdivision and will not evade review as a "remainder." If an exemption by a certificate of survey is used, the remaining tract of land is a separate parcel which must be surveyed.

**4-8. IDENTIFICATION CODES**

To assist in the implementation of this review process and to monitor those parcels by exemption the Clerk and Recorder may cause the following identification codes to be added to the numbering of recorded certificates of survey filed after the effective date of these regulations.

- CT ... Court order [76-3-201(1)(a), MCA]
- M ... Mortgage Exemption [76-3-201(1)(b), MCA]
- LE ... Life Estate [76-3-201(1)(e), MCA]
- R ... Relocation of Common Boundary [76-3-207(1)(a), MCA]
- F ... Family Conveyance [76-3-207(1)(b), MCA]
- A ... Agricultural Exemption [76-3-207(1)(c), MCA]
- SO ... Occasional Sale (used prior to April 6, 1993)
- AG ... Aggregation of Lots [76-3-207(d), MCA]